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Nos. 71-1016 And 71-1040

In The

# Supreme Court of the United States

October Term, 1971

Federal Power Commission, Petitioner

v.

Louisiana Power & Light Company, et al.

United Gas Pipe Line Company and Pennzoil United, Inc., Petitioners

v.

Louisiana Power & Light Company

On Writs of Certiorari to The United States Court of Appeals For The Fifth Circuit

## BRIEF OF TEXACO INC. AMICUS CURIAE

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., PETITIONERS

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF TEXACO INC. AMICUS CURIAE

### STATEMENT OF INTEREST

Texaco Inc. ("Texaco"), pursuant to Rule 42(2) of the Court, respectfully submits its brief *amicus curiae*. The Solicitor General on behalf of the Federal Power Commission ("Commission"), United Gas Pipe Line Company and Pennzoil United, Inc. ("United"), and Lousisana Power and Light Company ("LP&L"), the parties to this case, have consented to the filing by Texaco of this brief. Letters

of consent are on file with the Clerk of the Court.

Texaco's interest in this proceeding stems from the fact that it sells substantial quantities of natural gas to United in the vicinity of New Orleans, Louisiana, which gas is taken by United into its New Orleans District pipeline facilities which have come to be known as the "Green System", serving LP&L's Nine-Mile Point electrical generating station, among other customers. This pipeline historically has been operated by United as a separate facility from its interstate pipeline network also located in the area. United represented to its Green System gas suppliers, such as Texaco, that this system was a nonjurisdictional intrastate pipeline, and agreed in its gas purchase contracts with Texaco and other gas suppliers to utilize the gas sold United entirely within the State of Louisiana (R.204-19).

Commencing in 1968, United, without Texaco's knowledge or for that matter without the knowledge or authorization from the Commission, began to inject limited quantities of gas from its interstate pipeline system into the Green System.[1] On October 1, 1970, United filed with the Commission an application seeking certification of the Green System and the sales and services rendered therefrom. Texaco intervened in that proceeding, F.P.C. Docket No. CP71-89, and actively opposed the assertion of Commission jurisdiction over the Green System.

The court below found on the basis of an uncontested record developed by United, the Commission and LP&L, that the Commission's jurisdiction under the Natural Gas

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[1] Considerable doubt exists as to United's motives in commencing these unauthorized and therefore unlawful gas flows. See Commissioner Carver's dissent in Opinion No. 610, reproduced as Appendix F, p. 127a in United's Petition filed herein in No. 71-1040.

Act[2] does not extend over the Green System. The Commission and United have not challenged this conclusion on its merits, but have asked this Court to consider the limited issue of whether or not LP&L should have exhausted its administrative remedies before seeking the help of the courts, by awaiting the outcome of United's certificate case.

Uncertainty exists in this proceeding, as well as in the law generally, between the application of the closely related doctrines of primary jurisdiction and exhaustion of administrative remedies. The fine line between the two need not be drawn in this case in that the Fifth Circuit's decision as to the Green System is proper under either theory. Texaco believes that other briefs herein will adequately set forth the arguments respecting the primary jurisdiction issue. In that the attorneys for the Commission and United have attempted to characterize this issue as one of exhaustion of administrative remedies, Texaco will show herein that under this theory the Fifth Circuit reached the correct result in finding that LP&L's suit was properly taken and that LP&L was not required to resort to administrative procedures.[3] It is to this point that Texaco addresses itself herein.[4]

Any decision by this Court affecting the jurisdictional status of United's Green System could have a substantial

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[2] 15 U.S.C. §§ 717, *et seq.*

[3] Throughout this brief when Texaco uses the term "exhaustion of administrative remedies" it does not assume that LP&L had an administrative remedy to pursue at the time of filing of its suit below. Indeed, the Commission has no power to grant injunctive relief or damages as sought by LP&L. See *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

[4] Texaco takes no position on the principal issue here before the Court concerning the Commission's continuing authority over curtailments of interstate natural gas to direct industrial cus

impact upon Texaco's gas sales to United. This is the basis of Texaco's interest in this case and the reason it has sought to participate *amicus curiae*.

## OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The Commission's brief adequately sets forth the opinions below, the jurisdiction of the Court, and the statutes involved insofar as these are relevant to the issue herein with which Texaco is concerned.

## QUESTION PRESENTED

Whether LP&L was required to await the outcome of United's certificate case before the Commission prior to seeking relief from the courts for United's failure to deliver its contract quantity of gas to LP&L's Nine-Mile Point electrical generating station.

## STATEMENT

Texaco adopts the statement of the case contained in the Commission's brief with two additions. In LP&L's injunctive action in the district court the Commission was

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tomers. It should be noted, however, that this question is entirely separate and may be decided independently of the Court's consideration of the Green System's jurisdictional status. LP&L's Sterlington Station is served from a concededly interstate pipeline and clearly poses the issue concerning curtailment authority of direct independent sales. This question raises substantial policy considerations in this time of national gas shortage. While the question of the jurisdictional status of the Green System is of importance to the customers thereon and the natural gas producers, like Texaco, selling gas to such system, this issue applies only to one of the nation's pipelines and does not involve widespread significance.

an active participant, introducing evidence and cross-examining witnesses on the flows of gas in United's Green System (R.177-82). Secondly, United introduced as an exhibit in that hearing its prepared direct case filed with the Commission in Docket No. CP71-89. The same United witness, Mr. Echterhoff, who sponsored data relied upon by the Commission in its Opinion No. 610 finding jurisdiction over the Green System, appeared and was cross-examined (R.138-43).

## SUMMARY OF ARGUMENT

Contrary to the assertions of the Commission and United, no hard and fast rule exists requiring exhaustion of administrative remedies in *all* cases involving administrative jurisdiction. The opinions below recognized this, and analyzed this issue by using the three-part test suggested in a leading text in the field (3 K. Davis, Administrative Law Treatise § 20.03). The use of this approach was reasonable in the circumstances of this case and properly resulted in a finding by the Fifth Circuit that LP&L was not required to resort to administrative action prior to seeking aid from the courts.

The first of the three elements of the test utilized by the court was a determination on LP&L's irreparable injury by awaiting the outcome of United's certificate proceeding. The court correctly found that LP&L has not yet been given an opportunity to prove the extent of its injury, but that the present record does not demonstrate that such injury is not likely to occur.

As a second part of Professor Davis' test, the court found that there is little doubt that the Commission's jurisdiction does not extend over United's Green System which serves LP&L's Nine-Mile Point station. An undisputed

factual record developed by United, the Commission and LP&L clearly indicates the limited flows of gas involved from United's interstate pipeline system into the self-contained Green System. All gas within the Green System, including the small percentage introduced therein from United's interstate lines, is consumed entirely within the State of Louisiana. Utilizing these basic facts the Fifth Circuit properly reviewed the existing legal precedents on commingling of jurisdictional and nonjurisdictional gas and found them inapplicable.[5] Of particular significance is the fact that the court below distinguished the instant situation from that considered in its earlier "*Florida Parishes*" decision, *Louisiana Public Service Commission* v. *F.P.C.*, 359 F.2d 525 (5th Cir. 1966), upon which United principally relied in seeking certification of the Green System from the Commission.

The court below properly concluded that exhaustion of administrative remedies was not required of LP&L because in these circumstances the Commission could contribute little of its special expertise to the determination of its jurisdiction. The Commission had already helped in the development of the record before the court on the gas flows involved. Consideration of the jurisdictional status of the Green System ultimately involved the application of existing law to the undisputed and reasonably uncomplicated facts of the case. The court below, it is submitted, is perfectly capable of determining the legal consequences of United's operation of its Green System.

Finally United has suggested as an additional reason

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[5] *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *F.P.C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965); *Louisiana Public Service Commission* v. *F.P.C.*, 359 F.2d 525 (5th Cir. 1966).

for requiring exhaustion of administrative remedies that LP&L's suit disrupted the Commission's consideration of United's certificate case, and will interrupt the normal course of judicial review of the Commission's Opinion No. 610 issued thereon. LP&L has never sought to enjoin the Commission's proceedings, but rather directed its action against United. Further Opinion No. 610 makes clear that the Commission was completely aware of the Fifth Circuit's decision but proceeded irrespectively of such decision. United also cites *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) for the proposition that an agency order cannot be collaterally attacked *after* judicial review has begun. This case has no application to the problem at hand in that LP&L's suit and the opinions of the courts below all occurred prior to the issuance of Opinion No. 610. No impediment to orderly judicial review of that opinion exists.

## ARGUMENT

### I

### EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED IN EVERY CASE INVOLVING AGENCY SUBJECT MATTER JURISDICTION

In asserting that LP&L should have awaited the outcome of United's certificate case both the Commission and United have principally relied upon *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g per curiam* 156 F.2d 821 (D.C. Cir. 1946) and other cases, for the proposition that there exists a long-settled rule of judicial administration that questions relating to an agency's subject matter jurisdiction should be determined by the agency in the first instance. The decisions of

this Court simply do not bear out the contention of the Commission and United that there is such a rule which must be applied in all circumstances. In at least seven cases the Court has passed upon questions of administrative jurisdiction without requiring exhaustion of administrative remedies.[6] As recently observed by the Court in *McKart* v. *U.S.*, 395 U.S. 185 (1969)[7] a case principally relied upon by United:

> "We do not view the cases of Falbo v United States, 32 US 549, 88 L Ed 305, 64 S Ct 346 (1944), and Estep v United States, 327 US 114, 90 L Ed 567, 66 S Ct 423 (1946), insofar as they concern the exhaustion doctrine, as a bar to today's holding. Neither those two cases, nor any of the other cases decided by this Court, stand for the proposition that the exhaustion doctrine must be applied blindly in every case . . . ." (395 U.S. 185, 200-01, n. omitted)

Rather than being an immutable rule, the exhaustion of administrative remedies doctrine is therefore exercised by the Court only where circumstances of a particular case dictate.

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[6] *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947); *Order of Railway Conductors of America* v. *Swan*, 329 U.S. 520 (1947); *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943); *Illinois Commerce Commission* v. *Thompson*, 318 U.S. 675 (1943); *Skinner and Eddy Corp.* v. *United States*, 249 U.S. 557 (1919); and *Gonzales* v. *Williams*, 192 U.S. 1 (1904).

[7] The Court in this case held that in a criminal proceeding concerning the failure of the defendant to report for induction into the Armed Forces, the defendant was not barred from raising the defense that he was a "sole surviving son" of a family whose father has been killed in action while serving in the Armed Forces by the fact that he had not exhausted his administrative remedies. United's reliance on this case is therefore misplaced in that no exhaustion was required. Additionally, the relevance of the discussion on exhaustion in the context of a criminal proceeding is questionable.

In this proceeding the district court's decision, which the Commission and United support, recognized as much. (United Pet. 41a).[8] In considering the exhaustion argument, the district court utilized a test proposed by Professor Kenneth Culp Davis in his *Administrative Law Treatise*, Volume 3, Section 20.03, page 69, involving three factors which should be considered in determining whether prior resort to administrative action is required in a particular proceeding.[9] The court quoted these three criteria as explained by Professor Davis:

> "The key factors are three: extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction. Unfortunately, each of these three key factors is a variable, and each often calls for a considerable amount of judgment for its proper appraisal.
>
> A workable standard probably should not go beyond a statement that each of these three factors should be weighed in determining whether or not a court should decide an issue of administrative jurisdiction without requiring exhaustion of administrative remedies. A neat word formula probably is not feasible." (United Pet. 41a)

Following the statement of this three part test the district court concluded that in the circumstances of this case exhaustion of administrative remedies was required. The Fifth Circuit, however, arrived at a different conclusion (United Pet. 25a-26a), stating:

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[8] "United Pet." references are to the petitions filed herein in No. 71-1040, which contain as appendices the relevant opinions of the Commission and courts below.

[9] The test recommended by Professor Davis has been employed in lower court decisions. See *Lone Star Cement Corp.* v. *F.T.C.*, 339 F.2d 505 (9th Cir. 1964); *United States* v. *Rockland Steamship Corp.*, 218 F. Supp. 509 (S.D.N.Y. 1963); and *Oil Shale Corp.* v. *Udall*, 235 F. Supp. 606 (D. Colo. 1964).

"Both United and the FPC contend that the curtailment proceedings in Docket No. RP 71-29 and the certificate proceedings in Docket No. CP 71-89 are within the jurisdiction of the FPC and that the court was correct in dismissing the present action. All parties cite numerous precedents, most from the Supreme Court. An attempt at rationalization would needlessly lengthen this opinion. The entire area has been thoroughly analyzed by a leading text in the field. It collects and discusses most of the authorities relied on by both sides. It was relied upon by the court below and we rely upon it here. *See* 3 K. Davis, Administrative Law Treatise §§ 20.01 through 20.03.

Because we hold the lower court erred in its holding regarding potential injury and in its views as to primacy of agency jurisdiction, we arrive at a different result in applying Professor Davis' three-part test (§ 20.03).

*See Bailey* v. *United States*, ..... F.2d ..... (5th Cir. 1971) [No. 71-1731, December 8, 1971], and *cf. United States* v. *Hernandez*, ..... F.2d ..... (5th Cir. 1971) [No. 71-1656, December 27, 1971]."

Texaco submits that the circumstances of this proceeding are such that LP&L was not required to await the outcome of the Commission's certificate case under the criteria used by the courts below.

### A. LP&L Would Sustain Substantial Injury From Pursuit Of Its Administrative Remedies.

The first consideration employed by the court below in considering the exhaustion of remedies problem was the extent of injury which LP&L would suffer from pursuit of its administrative remedy.[10] The question of irreparable

[10] Assuming that LP&L had chosen to await the outcome of the certificate proceeding with respect to the jurisdictional nature of the Green System and if it is ultimately determined in that

injury was at the heart of the proceedings below. In seeking injunctive relief to prohibit United from breaching its contract by failing to deliver the contract quantity of gas to its Nine-Mile Point station, LP&L alleged in its sworn complaint that it supplied electricity to various parishes in Louisiana and had interconnections with all other electrical utility companies in the state and most of the rural electrical cooperatives in the state (United Pet. 7a-8a). Through this network LP&L asserted that it served the electrical needs of numerous domestic and industrial customers as well as governmental subdivisions. Through other interconnections it participated in an area wide electrical network serving 2,500,000 consumers which is still further connected to various power sources throughout most of the eastern part of the nation. LP&L alleged that a failure to utilize the full electrical generating capacity of its Nine-Mile Point station at peak demand periods could cause an area "blackout" or "brownout" with damages beyond any means of calculation. It also asserted that it would lose electrical sales which could never be recovered because of the nature of its stock in trade, *i.e.*, electricity cannot be stored nor can it be delivered at any moment after the immediate demand has passed. A loss of such sales would involve further irreparable injury since the fixed cost of its basic electrical generating facilities continues to be depreciated whether they are used or not.

United and the Commission filed no responsive pleadings with the district court challenging these allegations on the merits (United Pet. 9a).

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proceeding that the Commission has no jurisdiction over such facilities serving LP&L's Nine-Mile Point station, then United's curtailment plan, as approved by the Commission, would not apply to the LP&L Nine-Mile Point station and assumedly no injunction to prevent United from employing such plan would be required.

The Fifth Circuit reversed the district court's finding that no irreparable injury had been shown by LP&L and remanded the case for further hearings in this regard. The court suggests that evidence be considered as to the fuel needs at the electrical generating stations, the alternative sources of energy supply, the amount of power that can be exchanged through interconnected sources and an analysis of LP&L's usual and peak day demands (United Pet. 12a). In summary the Fifth Circuit held that the record "does not demonstrate that such injury *is not likely to occur*" (emphasis added).

The extent of injury to LP&L has therefore not been finally determined. Nevertheless, several observations can be made with respect to this inquiry. First, the allegations of injury raised by LP&L have not been challenged on the merits by United or the Commission. The allegation of lost sales because of inadequate fuel supply will become more compelling as the summer air conditioning season increases the demand for electricity. Any injury being suffered by LP&L as the result of curtailed deliveries to the Nine-Mile Point station has continued since LP&L's suit in this proceeding was instituted in March of 1971, over a year ago, and such injury would continue for some unspecified period into the future while the Commission's deliberations continue in the remanded United certificate case, or conceivably while the Commission's Opinion No. 610 is under review in the Courts. In view of the fact that United is delivering less gas to LP&L's Nine-Mile Point station than called for in its contract, it may be assumed that to some degree LP&L has not been able to generate and sell electricity to its full capability and that irreparable injury has resulted therefrom.

**B. There Is Little Doubt That The Commission Jurisdiction Does Not Extend Over United's Green System.**

The second part of the test utilized by the courts below in resolving the question of exhaustion of administrative remedies was the evaluation of the degree of clarity or doubt about the Commission's jurisdiction over the Green System. An analysis of the jurisdictional question principally involves applying the existing legal precedent to an undisputed and relatively simple fact situation.

The basic factual predicate was created by the introduction into evidence as an exhibit in this proceeding United's prepared direct case which it had previously submitted to the Commission in connection with its certificate proceeding (R. 138-43). Within this material was an explanation of the flows of gas which have taken place from United's interstate system into the Green System over the past several years. Based upon this evidence and the cross-examination thereof, the Fifth Circuit found that United's intrastate Green System is located entirely within the State of Louisiana (United Pet. 22a). During 1970 United chose to inject limited volumes of interstate gas into the Green System which accounted for some 2.6 percent of United's deliveries to LP&L's Nine-Mile Point station. The court further found that no gas escapes from the Green System back into United's interstate system because of pressure differentials between the lines and the presence of valves separating the two at their limited points of interconnection.

In holding that essentially these same facts give rise to jurisdiction over the Green System, the Commission in Opinion No. 610 relied upon this Court's decisions in *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), ("*Lo-Vaca*"), the companion case of *Federal Power Commission* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965),

("*Amerada*") and the Fifth Circuit's decision with respect to Commission jurisdiction over certain other facilities of United in the *"Florida Parishes"* case, *Louisiana Public Service Commission* v. *F.P.C.*, 359 F.2d 525, (5th Cir. 1966) *cert. denied*, 385 U.S. 833.

The Court's *Lo-Vaca* and *Amerada* decisions are clearly distinguishable in several respects. The Green System unlike the situation in *Lo-Vaca* and *Amerada* does not involve an attempt to clothe interstate gas with an intrastate or nonjurisdictional sales character by contract language. Secondly, *Lo-Vaca* and *Amerada* involved situations where a commingled stream of jurisdictional and nonjurisdictional gas left the state of its origin. The Green System, however, is the exact opposite in that small quantities of gas from jurisdictional sources are introduced into a completely contained intrastate pipeline network and no gas from the Green System leaves the State of Louisiana. Thirdly, *Lo-Vaca* and *Amerada* cannot be read to hold that *every* commingling of jurisdictional and nonjurisdictional gas brings the nonjurisdictional gas within the Commission's jurisdiction.[11] Finally, the Court's *Lo-Vaca* decision rested on the fact that *substantial* rather than *de minimis* volumes of commingled gas were at issue.[12] The Court held:

> "The fact that a *substantial part* of the gas will be resold, in our view, invokes federal jurisdiction at the outset over the entire transaction . . . ." (379 U.S. 366, 369, emphasis added)

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[11] *Cf. Public Service Electric & Gas Company* v. *Federal Power Commission*, 371 F.2d 1 (3rd Cir. 1967); *Secretary of the Army* v. *Federal Power Commission*, 425 F.2d 496 (D.C. Cir. 1969).

[12] In its Opinion No. 610 the Commission found that the volumes of interstate gas introduced into the Green System were not *de minimis*, principally relying on "peak day" deliveries of such volumes (United Pet. 101a). It is erroneous to take a single "worst case" example in the year to judge the degree to which interstate gas has been injected into the Green System.

The *Florida Parishes* case is likewise distinguishable in that the facilities involved in that decision were determined to be an integrated part of United's interstate operations. In this case, however, United's Green System is entirely separate, with its own nonjurisdictional gas supply. The Fifth Circuit found no difficulty in distinguishing its earlier opinion in *Florida Parishes* from the case at bar (United Pet. 24a).

The Commission and United also suggest that the Commission's jurisdiction exists over the Green System by virtue of this Court's holding in *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U.S. 515 (1945) and *Federal Power Commission* v. *Florida Power and Light Co.*, No. 70-38, decided January 12, 1972. Both of these cases arose under the Federal Power Act[13] rather than the Natural Gas Act,[14] and involve the transmission of nonjurisdictional electricity across a state boundary. As previously mentioned no gas once having entered the Green System leaves the State of Louisiana. Therefore, these cases like *Lo-Vaca and Amerada* are distinguishable from the situation here under consideration.

The Commission's jurisdictional determination over the Green System in Opinion No. 610 was likewise in error in its failure to recognize that Congress in amending the Natural Gas Act in 1954 to add Section 1(c)[15] known as the "Hinshaw Exemption" expressed its clear intention to exempt operations such as United's Green System from Commission jurisdiction.[16] The legislative history of the

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[13] 16 U.S.C. §§ 800, *et seq.*

[14] 15 U.S.C. §§ 717, *et seq.*

[15] 15 U.S.C. § 717(c), reproduced in footnote 7, Opinion No. 610 United Pet. 108a).

[16] *Cf. Virginia Petroleum Jobbers Ass'n.* v. *F.P.C.*, 265 F.2d 364, 368 (D.C. Cir. 1959), discussing Congress' intent to overcome *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950).

enactment of the Hinshaw Amendment clearly indicates Congress' intention. As stated in Senate Report No. 817, July 30, 1953, accompanying H.R. 5967:

> "The purpose of this legislation is to clarify the Natural Gas Act by further defining the limits of the Federal Power Commission's jurisdiction with respect to operations of companies engaged in the local distribution within a State of out-of-State natural gas which has been received by such a company at or within the state borders." (1954 U.S. Code Congressional and Administrative News, p. 2102)

The only requisites for operation of Section 1(c) of the Act are that the jurisdictional gas received in the state be ultimately consumed in such state and that the rates charged, services performed, and the facilities used be subject to the regulation of the state regulatory commission. The record in this case clearly indicates that the jurisdictional gas received in the Green System is ultimately consumed in the State of Louisiana. The State of Louisiana in its motion filed herein for leave to orally argue as *amicus curiae* dated April 3, 1972 clearly indicated that it is ready, willing and able to perform its duty to the extent permissible under its State Constitution as a state regulatory agency over United's Green System. The instant factual situation concerning the Green System is precisely the type which was considered by Congress to be "primarily of local nature and subject to the regulation of the several states."[17]

It is clear, therefore, that the Commission's jurisdiction does not exist over United's Green System under the applicable precedent. The need for resort to administrative remedies by LP&L was not required in these circumstances.

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[17] 15 U.S.C. § 717(c).

### C. No Specialized Administrative Understanding Of The Question Of Jurisdiction Over The Green System Is Involved.

The final element in Professor Davis' three-part test is an inquiry into the degree to which an administrative agency may be required to sort through the various contentions of parties and to apply its special expertise to the matters concerning its jurisdiction. As noted above, in this proceeding the Commission fully participated in the development of the record upon which the Fifth Circuit's decision respecting jurisdiction over the Green System was made. The record shows no dispute as to the material facts involved.[18] The question of application of existing legal precedent is one within the capability of the court which properly exercised its prerogatives to decide legal issues.

The Commission and United in their briefs have suggested that the Fifth Circuit's decision on the jurisdictional issue was inappropriate because the court did not have before it evidence which was presented in the certificate proceeding before the Commission. It is cited that the Commission's record in the certificate proceeding consisted of 1,276 pages of transcript, 63 exhibits and ten items by reference. This recitation is misleading in that the bulk of the testimony, exhibits and items by reference in the certificate case related to issues other than the Commission's jurisdiction over the facilities involved. United tendered a single witness, Mr. Echterhoff, on the critical issue of gas flows into the Green System from United's interstate facilities. Mr. Echterhoff's same testimony was also introduced in the injunctive hearing below. Therefore, the possible

[18] The same was true with respect to the record before the Commission in United's certificate case. There the Commission granted waiver of the presiding examiner's initial decision, apparently feeling that there was no need for his assistance in considering the uncomplicated and undisputed fact situation.

distinctions on the jurisdictional point between the record available to the Commission in the certificate case and the record available to the court below lie in the extent of the direct and cross-examination by various parties to either proceeding. It must be reiterated, however, that the testimony on the gas flows, a subject uniquely within United's knowledge, was not rebutted by testimony of any party in either the Commission's certificate case or in the proceedings below.

For the foregoing reasons it is submitted that no particular degree of administrative expertise is required in these circumstances to sort through a complicated and contradicted factual record. The flows of gas involved are undisputed and reasonably simple in concept. The principal difficulty is in the application of existing law to these undisputed facts, a subject which the Court is as capable of performing as the Commission.

For the foregoing reasons Texaco submits that the Fifth Circuit was justified in not requiring that LP&L await the outcome of United's certificate case, a process which may take an indefinite length of time in view of the potential court review of Opinion No. 610 as well as the uncertainty as to the remanded certificate proceeding still before the Commission. It is likely that LP&L has suffered and will continue to suffer irreparable injury from imposition of United's curtailment program to LP&L's Nine-Mile Point station. There is no doubt that the Commission's jurisdiction does not extend over the Green System. Finally the determination of such jurisdiction is not a matter which falls uniquely within the Commission's field of expertise in this case.

## II

## THE INSTANT PROCEEDINGS HAVE IN NO WAY INTERRUPTED THE COMMISSION'S CERTIFICATE PROCEEDING CONCERNING UNITED'S GREEN SYSTEM OR THE PROCEDURES FOR ORDERLY REVIEW OF THE COMMISSION'S OPINION NO. 610 ISSUED THEREIN

United has raised as an additional reason why LP&L should exhaust its administrative remedies, the claim that the instant proceedings have in some way disrupted the Commission's consideration of United's certificate case as well as the orderly judicial review of Opinion No. 610 issued in the proceeding, pursuant to Section 19(b) of the Natural Gas Act.[19] United has recognized, however, that unlike the situation in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), LP&L has not sought an injunction against the Commission's certificate proceeding which has continued unabated through the hearing stage in June 1971 and in which Opinion No. 610 was issued on February 9, 1972 (United Pet. 91a). From a reading of the Commission's Opinion No. 610 it is apparent that the Commission, while aware of LP&L's actions below, was not deterred from continuing its consideration of the certificate case. The Commission stated:

> "73. In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, Fifth Circuit No. 71-2550, decided Jan. 14, 1972, ..... F.2d ....., the court held that '. . . The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction' (Slip Op. p. 29). Since we respectfully disagree with the legal conclusion drawn by the court, we are constrained to consider the question of whether this

[19] 15 U.S.C. § 717r(b).

Commission is precluded from making an independent decision based upon the record in the case before us. (United Pet. 121a-122a)

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"83. We conclude that we are not precluded from reaching a decision by the action of the court's opinion. The LP&L case is a collateral attack on the Commission's jurisdiction to hear and to decide the case presented in Docket No. CP71-89. Counsel for the Commission, authorized and directed to appear for the Commission as intervener in the collateral suit, asserted the primary jurisdiction of this Commission to decide the case; — the Commission did not — and could not — take a position on the merits until this decision was reached. Therefore, the instant decision is the first opportunity we have had to decide the issues entrusted to us by the Congress through the Natural Gas Act, subject to court review. We thus feel constrained to state for the review of any Court of Appeals and the Supreme Court, if certiorari be granted, the findings and conclusions of law in the order herein entered." (United Pet. 124a)

United has also cited the case of *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) and two lower court decisions for the proposition that "when Congress has provided statutory procedures designed to permit agencies expertise to be brought to bear on particular problems these procedures are to be exclusive" (United's Brief p. 23). Texaco submits that the *Tacoma* case stands for the proposition that review of a Commission order must follow the procedures set forth in the applicable judicial review section of the agency's enabling statute and may not be attacked *after* issuance of the order in a collateral proceeding. This problem is simply not presented in this case. LP&L's suit below was brought long before the Commission issued its Opinion No. 610 in the certificate case and in fact the decision of the Fifth Circuit below likewise pre-

ceded the issuance of the Commission's decision. Therefore, the instant proceeding cannot be characterized as in any way interfering with the orderly review of Opinion No. 610. Applications for rehearing have been filed to the Commission's order. Nothing in this proceeding will prevent any party from following the regular procedure of taking an appeal to an appropriate circuit court upon issuance of the Commission's order on rehearing.[20]

United's concern over the interruption of the orderly process of appeal has a particularly hollow ring when considering the fact that United petitioned this Court for direct review of the Commission's Opinion No. 606 in its curtailment proceeding without the benefit of the Fifth Circuit's consideration of that matter. While the Court denied United's petition with respect to this request, United and the Commission fervently argue herein for a decision on the merits on the Commission's curtailment powers which would unquestionably affect the decision of the Fifth Circuit on this matter. Thus, while United is perfectly willing to have the power of the Commission over curtailments decided in this proceeding it argues that an appropriate court of appeals must be given full rein to consider the question of the jurisdiction over the Green System, unencumbered by the decision of the court below.

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[20] On April 7, 1972 the Commission issued its Order on rehearing, Opinion No. 610-A, reaffirming its prior finding of jurisdiction over United's Green System in Opinion No. 610. Texaco believes that Opinion No. 610-A will be set forth as an appendix to the Amicus Curiae brief filed hereby by Humble Oil and Refining Company. Texaco respectfully commends to the Court's attention the dissenting statement of Commissioner Carver wherein he points out the fact that the Commission's jurisdictional determination was made on the basis of extra-record, *ex parte* advice from the Commission's Staff. This disclosure creates an additional reason why the Fifth Circuit's decision with respect to the Green System should be left undisturbed.

## CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed as to the nonjurisdictional status of United's Green System serving LP&L's Nine-Mile Point station on the basis that the court had all necessary authority to decide this issue.

Respectfully submitted,

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